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FOR ARGUMENT

In the

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

## No. 75-1335

THE ABSENTEE DELAWARE TRIBE OF OKLAHOMA
BUSINESS COMMITTEE, ET AL.,
*Appellants,*

VERSUS

WANDA JUNE WEEKS, ET AL.,
*Appellees.*

**On Appeal from the United States District Court for the Western District of Oklahoma**

## REPLY BRIEF FOR THE ABSENTEE DELAWARE TRIBE BUSINESS COMMITTEE

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WANDA JUNE WEEKS, ET AL.,
*Appellees.*

**On Appeal from the United States District Court for the Western District of Oklahoma**

**REPLY BRIEF FOR THE ABSENTEE DELAWARE TRIBE BUSINESS COMMITTEE**

## INTRODUCTION

This Reply Brief is submitted in response to the consolidated Brief filed by Appellees in Nos. 75-1301, 75-1335 and 75-1495.

Insofar as feasible, our reply is limited to only such contentions of the Appellees as are directed toward the Absentee Delaware Tribe of Western Oklahoma whose Business Committee is Appellant herein. We observe, however, that several of Appellees' sweeping claims, while directed largely against the Brief filed in No. 75-1301, necessitate some reply from Appellants herein because of the breadth of the arguments asserted in Appellees' consolidated Brief.

## SUMMARY OF ARGUMENT

No little part of the "Kansas Delawares" Brief is mere rhetoric. Thus, the "Kansas Delawares" assert that they are "not outside the protection of the Fifth Amendment just because they have some fractional Indian blood in their veins" (p. 63). No one contends that Appellees are "outside the protection" of the Fifth Amendment. *Cf., Northern Cheyenne Tribe* v. *Hollowbreast*, ..... U.S. ....., No. 75-145, decided May 19, 1976. Appellees say that "classifications in statutes must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike" (p. 47). No one questions this recitation of hornbook law insofar as it describes discrimination which is "patently arbitrary" or "invidious." *Cf., Mathews* v. *Diaz*, ..... U.S. ....., No. 73-1046, decided June 1, 1976. Appellees contend that neither the Delaware Tribe nor the Absentee Delaware Tribe of Western Oklahoma possesses sufficient tribal "infrastructure" to be considered a tribal organization, an argument contrary to the express findings of the District Court. J.S. App. 12, 13, 16 and n. 12. See also, *United States* v. *United States Fidelity and Guaranty Co.*, 309 U.S. 506, 511-512.

What is, perhaps, most striking about the "Kansas Delawares" Brief is what is absent: a single relevant citation to any decision of this or any other Court voiding an Act of Congress enacted pursuant to Congress' plenary power over Indian affairs. This is, no doubt, explicable because the contention that Congress has exceeded its power over Indian affairs, or has impaired vested rights

of individual Indians in tribal property "is one that has often been made in this court and rejected as often as made." *Chase* v. *United States*, 256 U.S. 1, 7. The instant case surely does not present any extraordinary facts which should cause this Court to depart from principles so long followed and so consistently applied. See, *e.g.*, *Sizemore* v. *Brady*, 235 U.S. 441, 447-449.

Since Appellants have contended, in their Jurisdictional Statements and Briefs in this Court, that the "Kansas Delawares" argument for holding 25 U.S.C. (Supp. IV), §§ 1291-1297 unconstitutional ignores the permissibility of a distinction between federally recognized tribes and fully emancipated non-ward descendants of former tribal members, who are not under the supervisory control of, or have any contact with, the Bureau of Indian Affairs, it is hardly less striking that the "Kansas Delawares" do not even *mention*, at *any* point in their Brief, this Court's decision in *Morton* v. *Mancari*, 417 U.S. 535, nor the cases in this Court which have applied the principles of *Mancari* to varying factual circumstances. *Fisher* (Northern Cheyenne Tribe) v. *District Court*, ___ U.S. ___, No. 75-5366, decided March 1, 1976; *Moe* v. *Confederated Salish and Kootenai Tribes*, ___ U.S. ___, No. 74-1656, decided April 27, 1976.

It must be assumed that this studied silence is the result of a realization that this Court's approval of congressional power to distinguish between those whom Congress defines as members of federally recognized tribes under the supervision of the Bureau of Indian Affairs and a racial group consisting of "Indians" is fatal to the "Kansas Delawares" contention that 25 U.S.C. (Supp. IV) §§ 1291-1297

exceeds Congress' extraordinarily broad power over Indian affairs.

It should be borne in mind that the "Kansas Delawares" are not members of the federally recognized Delaware Tribes; that they are, by their own description, fully emancipated non-ward citizens who possess "some fractional Indian blood"; that they are descendants of persons who long ago severed their tribal relations, renounced Delaware citizenship, assumed United States citizenship, and elected to forego forever their right to participate in the Delaware Tribe's councils, property or annuities, or the children of such expatriates whose uncertain status was ended when United States citizenship was conferred upon them in 1875. Article IX, Treaty of July 4, 1866, 14 Stat. 793, 796 and Act of June 22, 1874, 18 Stat. 146, 175.[1]

Appellees, thus, fall squarely within the distinction of *Mancari:* "a racial group consisting of 'Indians' " as compared to "members of 'federally recognized' tribes." *Mancari, supra*, 417 U.S. 535, 553, n. 24. See also, *Fisher* (Northern Cheyenne Tribe) v. *District Court*, ..... U.S. ....., No. 75-5366, decided March 1, 1976; *Moe* v. *Confederated Salish and Kootenai Tribes*, ..... U.S. ....., No. 74-1656, decided April 27, 1976.

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[1] Appellees correctly note that the grant of citizenship to these children in 1875 would not, of itself, divest Congress of its power to legislate in regard to them. *E.g., Hallowell* v. *United States*, 221 U.S. 317. Appellees fail to note, however, that the explicit provision regarding children of the resigning "Kansas Delawares" contained in Article IX of the Treaty, taken together with the Act of 1875, clearly constituted a determination by Congress to end their connection with the Delaware Tribe. *Cf., Sizemore* v. *Brady*, 235 U.S. 441, 447-449.

Since Appellees do not at *any* point in their Brief discuss *Mancari* or its progeny, there is no occasion in the present case for the Court to determine any ultimate limits upon *Mancari*, nor any possible extraordinary situations where its rationale might be inapplicable. We do not suggest that *Mancari, Fisher* and *Moe* are the *sine qua non* of Indian law, regardless of the circumstances of a possible future case; we do strongly urge that they are directly controlling upon the facts presented by instant case, even assuming *arguendo*, that the facts here present a non-political question properly subject to judicial resolution. On the latter point, see, however, *Cherokee Nation* v. *Hitchcock*, 187 U.S. 294; *Lone Wolf* v. *Hitchcock*, 187 U.S. 553.

The "Kansas Delawares" have presented no argument sufficient to justify the unprecedented decision of the divided court below, nor have they cited a single relevant decision of this Court in the area of federal Indian law which supports the judgment of the District Court, and that judgment should not be allowed to stand.

## ARGUMENT

### I.

### A.

### RESPONSE TO APPELLEES' "REVISED STATEMENT OF THE CASE"

The "Kansas Delawares" have presented to the Court a reproduction of the Statement of the Case contained in the Brief for the Delaware Tribal Business Committee in No. 75-1301, with deletions and additions thereto. The bulk of the "Kansas Delawares" "Revised Statement of the Case" deals with the relationship of those Delawares who resigned from the Tribe pursuant to Article IX of the Treaty of July 4, 1866, 14 Stat. 793, 796, and their children, to the Delaware Tribe which resided in the Cherokee Nation of the Indian Territory and, later, the State of Oklahoma.

Since the "Kansas Delawares" assertions scarcely touch upon the status of the Absentee Delaware Tribe of Western Oklahoma whose Business Committee is the Appellant in the instant case, and since little challenge is raised to the Statement of the Case contained in the Brief of the Absentee Delaware Tribe of Western Oklahoma Business Committee, only a short reply statement is necessary from us as to this portion of the "Kansas Delawares" Brief. We note the following:

1. Contrary to the "Kansas Delawares" assertion (pp. 5-6) the funds appropriated and distributed by 25 U.S.C. (Supp. IV) §§ 1291-1297 are not characterizable as assets of the Delaware National Trust Fund created by the Treaty

of May 6, 1854, 10 Stat. 1048. Nothing in the statute gives the slightest indication that Congress intended, in enacting the statute, to revive a "trust fund" which had ceased to exist more than a century before.

2. The "Kansas Delawares" err in stating (p. 7, n. 2) that the Act of June 22, 1874, 18 Stat. 146, 175, did not affect the status of the minor children of the expatriated "Kansas Delawares." By Article IX of the Treaty of July 4, 1866, 14 Stat. 793, 796, these minors were to elect whether to accept United States citizenship or remain citizens of the Delaware Tribe, upon reaching majority. The statute, by conferring United States citizenship upon these minors, had the effect, in the words of the District Court, of "eliminating the requirement of an election." J.S. App. 17; 406 F.Supp. 1320.[2]

3. No factual support is offered, or is present in the record, to support the assertion (p. 8) that the Delawares "who moved to the Cherokee Nation did so individually and not as a tribe." The contention is negated by the terms of the 1866 Treaty itself. There would have been no need to prepare a registry of those Delawares "who have elected to *dissolve* their *tribal relations* and become citizens of the United States . . ." (14 Stat. 796), if the assertion were correct. We observe that the assertion is also contradicted by Appellees' themselves, on page 19 of their Brief.

4. The argumentative contentions inserted by the "Kansas Delawares" on pages 8 through 10 of their Brief that the Delaware Tribe ceased to exist as a tribal entity

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[2] References to "J.S. App." are to the Appendix to the Jurisdictional Statement of Appellants herein.

in 1895 are not only unsupported by the record, but are, in fact, contrary to the express findings made by the District Court on this point: "The Kansas Delawares deny that such tribal identity has been maintained by the Cherokee Delawares. . . . We are unable to agree, and find that the Cherokee Delawares have maintained group identity, having chiefs and business committees continuously until the present time." J.S. App. p. 16, n. 12; 406 F.Supp. 1320, n. 12.

5. Likewise, the Absentee Delaware Tribe of Western Oklahoma has "maintained group identity, having chiefs and a tribal council up to the present time." J.S. App. p. 12; 406 F.Supp. 1318.

6. Contrary to the assertion (p. 14) of the "Kansas Delawares", the legislative history of the statute was not obtained solely because Appellants contended that the exclusion of the "Kansas Delawares" was "conscious." The apparent motivating force which moved the District Court to obtain this legislative history, on its own motion, was the "Kansas Delawares" insistence that Congress did not "really" understand the effect of the statute here at issue; that Congress did not "really" intend to exclude them; and that this was a case of legislative oversight.

7. Since no question as to statutory construction is before the Court, we do not respond to the "Kansas Delawares" deductions from the legislative or administrative history of the statute—they are immaterial to the question for decision: whether the statute is constitutional as it is written.

## B.

## REPLY TO "ADDITIONS TO STATEMENT"

1. The "Kansas Delawares" correctly note (p. 18) that Article XIII of the Treaty of May 6, 1854 uses the phrase, "Delaware people". In addition, the Treaty uses the term "Delawares", without further description. The "Kansas Delawares" do not point to any factual difference which would result from any subtle changes in terminology in the 1854 Treaty, and we suggest there is none.

2. The "Kansas Delawares" err in suggesting that the Treaty of July 1, 1860, 12 Stat. 1129, is relied upon by the Absentee Delaware Tribe of Western Oklahoma as a basis for their inclusion within the terms of 25 U.S.C. (Supp. IV) §§ 1291-1297. Rather, as clearly stated in our original Brief (p. 12), Article IV of the Treaty was referenced for its "demonstration of the contemporaneous understanding of the structure of the Delaware Tribe."

3. We agree with the assertion (p. 19) that the Delaware Tribe agreed to move to the Indian Territory *"as a tribe."* This correct statement by the "Kansas Delawares" directly contradicts their erroneous statement, on page 8 of their Brief, that the Delawares removed to the Indian Country *"individually and not as a tribe"*. (emphasis in original).

## C.

## RESPONSE TO STATEMENT OF "STATUS OF CHEROKEE AND ABSENTEE DELAWARES AND RELATIONS OF KANSAS DELAWARES TO SUCH GROUPS"

1. The "Kansas Delawares" contention (p. 12) that the Delaware Tribe ceased to exist as a tribe in 1895 is, as previously noted, directly contradicted by the express findings of the District Court to the contrary on this precise question. J.S. App. p. 16, n. 12; 406 F.Supp. 1320, n. 12.

2. The argumentative assertion as to the purpose of the 1906 Delaware payroll, and the opinion of the Comptroller of the Treasury, 11 Dec. Comp. Gen. 496 (1905), is in error insofar as it suggests that ancestors of the Absentee Delaware Tribe of Western Oklahoma would have been included on this payroll if the roll had been intended as a roll of all tribal Delawares as of 1905. The purpose of the payroll was, as the Comptroller General plainly stated (11 Dec. Comp. Gen. 496, 500-501), to prepare a roll of those Delawares who were resident in the Cherokee Nation and, therefore, were still members of the Cherokee Delaware Tribe. These are the Delawares who presently constitute the Delaware Tribe of Oklahoma—a separate and distinct entity from the Absentee Delaware Tribe of Western Oklahoma. It is factually settled that the two modern tribal entities spring from sources which, as of approximately 1829, are discrete.

3. The "Kansas Delawares" err in stating (pp. 24-25) that the claims attorney for the two Delaware Tribes "assured" Congress that use of the 1906 and 1940 rolls would not exclude any members of the tribe as it existed

in 1854. The attorney responded to the question of Rep. Edmondson, Chairman of the Subcommittee on Indian Affairs of the House of Representatives, by stating he did not *believe* such persons existed, and by noting immediately thereafter that the Bureau of Indian Affairs held a contrary opinion on the subject. J.S. App. 70; 406 F.Supp. 1348. We note in passing that we believe this point to be wholly immaterial to the constitutionality of the statute, and we pause to make the correction only because the "Kansas Delawares" rely so heavily upon the "legislative history" of the statute as a predicate for attacking is validity.

4. We do not attempt to determine whether all the assertions as to a proposed "administrative construction" of the statute, after its enactment, (pp. 25-26) are supported by the record information contained in the appeal file of Wanda June Weeks, since we believe it clear that these assertions are probative of no issue pertaining to the constitutionality of the statute as it is written.

## II.

## A.

## RESPONSE TO ARGUMENT UNDER PROPOSITION I(A)

The contentions put forth in Proposition I (A) merely disclose what no one disputes—the instant case and *Lone Wolf* v. *Hitchcock*, 187 U.S. 553, 565, do not involve precisely identical facts and are, therefore, "distinguishable" in the sense that any two legal disputes may be "distinguished" from one another. Nothing said by the "Kansas Delawares," and nothing contained in any of the cases cited provides the structure for a genuine difference in legal principle between the present case and *Lone Wolf*.

It was to this "distinguishing" of *Lone Wolf* that Chief Judge Daugherty bitingly objected when he wrote that "*Lone Wolf* has not been reversed and the cases following it are too numerous to cite." J.S. App. p. 82; 406 F.Supp. 1353.

The assertion (p. 33) that there is no problem regarding lack of discoverable and manageable standards for resolving the questions presented by this case, and the supposed lack of need for an initial policy determination of a kind clearly for non-judicial discretion, is refuted by the very contentions contained in Part IB of the "Kansas Delawares" Brief; *i.e.*, the degree of "tribal infrastructure" (p. 36) necessary in order to meet the requisites which "should" allow an Indian Tribe to be qualified by the Department of the Interior as a federally recognized tribe. This is clearly a policy determination of a type best suited to the judgment of the Executive Branch, based upon consistent experience, rather than the episodic event of litigation.

We suggested, in our original Brief, that the District Court's reasoning was based primarily upon its assumption that *Lone Wolf* had been substantially overruled, *sub silento*, by *Baker* v. *Carr*, 369 U.S. 186, 215-217. The "Kansas Delawares" characterize this argument as "somewhat audacious." The characterization is better applied to the reasoning of the majority below. Chief Judge Daugherty plainly shared this view. As noted, Judge Daugherty answered the contention of the majority below when he stated that *Lone Wolf* "has not been reversed and the decisions following it are too numerous to cite." J.S. App. 82; 406 F.Supp. 1353.

**B.**

**THE CONTENTION THAT THE ABSENTEE DELAWARE TRIBE OF WESTERN OKLAHOMA IS NOT "AN INDIAN TRIBE" WITHIN THE MEANING OF THE CONSTITUTION IS WITHOUT MERIT.**

The argument at pages 34-38 of Appellees' Brief (Part IB) that the Delaware Tribe of Oklahoma and the Absentee Delaware Tribe of Western Oklahoma lack sufficient elements of "infrastructure"—a term the "Kansas Delawares" carefully do not attempt to define—to properly constitute Indian Tribes is, as previously noted, refuted by the express findings of the District Court, J.S. App. 12-13, 16, n. 12, and, obviously, contrary to this Court's holding in *United States* v. *United States Fidelity and Guaranty Company*, 309 U.S. 506, that "the public policy which exempted the dependent as well as the dominent sovereignties from suit without consent continues this immunity even after dissolution of the tribal government," 309 U.S. 506, 510-511, as well as the long line of decisions in the Courts of Appeals, some of which the "Kansas Delawares" themselves recognize on page 40 of their Brief. *E.g.*, *Martinez* v. *Southern Ute Tribe*, 249 F.2d 915 (10th Cir. 1957), *cert. den.* 356 U.S. 906; *Fondahan* v. *Native Village*, 450 F.2d 520 (9th Cir. 1971); *Baciarelli* v. *Morton*, 481 F.2d 610 (9th Cir. 1973); *Tewa Tesuque* v. *Morton*, 498 F.2d 240 (10th Cir. 1974); *Means* v. *Wilson*, 522 F.2d 833 (8th Cir. 1975); *Lomayaktewa* v. *Hathaway*, 520 F.2d 1324 (9th Cir. 1975), *cert. den. sub nom.*, *Susenkewa* v. *Kleppe*, ..... U.S. ..... (March 29, 1976).

Additionally, the "Kansas Delawares" contentions in this portion of their Brief are obviously inconsistent with

the Court's decisions in *Morton* v. *Mancari*, 417 U.S. 535, 552-553 and n. 24, as well as the cases which have applied *Mancari's* clear distinction between "a racial group of 'Indians' " and "members of 'federally recognized' tribes." *E.g.*, *Fisher* (Northern Cheyenne Tribe) v. *District Court*, ... U.S. ... , No. 75-5366, decided March 1, 1976; and *Moe* v. *Confederated Salish and Kootenai Tribes*, ... U.S. ... , No. 74-1656, decided April 27, 1976. As discussed *supra*, *nowhere* in their Brief do the "Kansas Delawares" even *mention* *Mancari*, or the cases which have followed it. The studied silence speaks volumes.[3]

Finally, and of particular importance to the appeal in this case, we emphasize that the "Kansas Delawares" do not mount a serious challenge to the decision of the Secretary of the Interior to have recognized for two decades the Absentee Delaware Tribe of Western Oklahoma as an Indian Tribe within the meaning of Article I, section 7, cl. 3 of the Constitution. In view of the evidence in the record

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[3] Neither of the cases cited (p. 37) by the "Kansas Delawares" on this point gives support to their position. In *Joint Tribal Council of Passamaquoddy Tribe* v. *Morton*, 388 F.Supp. 649 (N.D. Maine, 1975), *affirmed*, 528 F.2d 370 (1st Cir. 1975), the court held that the refusal of the Secretary of the Interior to recognize a long extant Indian Tribe was arbitrary and capricious in view of the express terms of the Indian Non-Intercourse Act, 25 U.S.C. §177. *United States* v. *State Tax Commission of Mississippi*, 505 F.2d 663 (5th Cir. 1974), contains a dictum to the effect that the Treaty of Dancing Rabbit Creek, Treaty of September 27, 1830; 7 Stat. 333, abrogated the status of Choctaw Indians *in Mississippi*; that the Secretary of the Interior could not, therefore, recognize a band of Choctaw Indians in Mississippi as a federally recognized tribe and, *by such action alone*, grant them immunity from state taxation. Since the case is plainly not in point, we need not give it lengthy consideration. However, we do note that the dictum is subject to serious question in light of this Court's recent decision in *Bryan* v. *Itasca County*, ... U.S. ... , ... and n. 2, No. 75-5027, decided June 14, 1976.

(see, Joint Appendix, pp. 64-71) and the express findings of the court below, the "Kansas Delawares" reticence in challenging the tribal status of the Absentee Delaware Tribe of Western Oklahoma is understandable.

## C.

## APPELLEE'S CONTENTION THAT 25 U.S.C. (Supp. IV) §§ 1291-1297 DOES NOT AFFECT THE STATUS OF FEDERALLY RECOGNIZED TRIBES IS IN ERROR

In Part IC and the latter Part of IB, of Appellees' Brief, where Appellees finally come to grips with the fact that Appellants in both No. 75-1335 and No. 75-1301 are the Business Committees of the two federally recognized Delaware Tribes, their entire argument is devoted to the contention that Congress did not "intend" to define membership in the two Delaware Tribes through use of the two tribal rolls employed in 25 U.S.C. § 1291(c)(1) and § 1291(c)(2). The theory of the "Kansas Delawares" is directed toward statutory criteria established by 25 U.S.C. § 1291(c)(1). This is the criteria for the Delaware Tribe of Indians, *not* the Absentee Delaware Tribe of Western Oklahoma, Appellants herein. The Absentee Delaware Tribe of Western Oklahoma's membership and eligibility criteria are established by 25 U.S.C. § 1291(c)(2).

Significantly, the "Kansas Delawares" dwell upon the existing structure of the Delaware Tribe of Indians *only*, carefully avoiding a challenge to the Absentee Delaware Tribe of Western Oklahoma. For this reason, we merely note that the only difference between the definition of membership contained in the constitution of the Delaware Tribe of Western Oklahoma and that contained in 25 U.S.C.

§ 1291(c)(2) is that the tribal constitution contains a 1/8th blood requirement. As demonstrated in our original Brief, Congress possessed ample power to define membership in the Absentee Delaware Tribe of Western Oklahoma as it did here. The only requisite for a proper statutory delineation of tribal membership is that the statute include Indians who have a substantial relationship to the tribe. See especially, *Sizemore* v. *Brady*, 235 U.S. 441, 447 and *Simmons* v. *Eagle Seelatsee*, 244 F.Supp. 808, 813-814, *affirmed*, 384 U.S. 209; see also, *Morton* v. *Mancari*, 417 U.S. 535, 553 and n. 24.

The bald statement by the "Kansas Delawares" that Congress did not here "intend" to define membership in the modern day Delaware Tribes is conclusively negated by the express terms of the statute itself. Here again, the silence of the "Kansas Delawares" is eloquent. We note that not a single decision of this Court, or any other court, is cited by Appellees in support of the argument in part IC of their Brief. This is unsurprising. The decision of this Court most nearly in point—*Morton* v. *Mancari*, 417 U.S. 535, 553 and n. 24—cuts squarely against the contentions put forward by Appellees. Thus, 25 U.S.C. § 1293 instructs that no application for enrollment shall be finally denied until it has been reviewed by a Committee of the Delaware Tribe of Oklahoma and the Absentee Delaware Tribe of Western Oklahoma, and further provides that the Committee shall notify the Area Director of the Bureau of Indian Affairs, in writing, regarding its decision on all applications for enrollment.

Yet more strikingly, 25 U.S.C. § 1294(a), by its terms, directs that ten per cent of the funds appropriated shall be

apportioned "*to the Absentee Delaware Tribe of Western Oklahoma, as presently constituted, . . .*" These funds are to be "advanced, expended, invested or reinvested for any purpose that is *authorized by the tribal governing body* and approved by the Secretary of the Interior." (emphasis added).

As observed in our original Brief (pp. 37-38), and by the Secretary of the Interior in No. 75-1495, pp. 32-33, n. 33, Congress might well have appropriated the entire fund, rather than ten per cent, directly to the Absentee Delaware Tribe of Western Oklahoma, with the proviso that the Tribe should then distribute ninety per cent of the funds appropriated to its members, either as defined by reference to the 1940 base census roll (25 U.S.C. § 1291(c)(2)), or by reference to the tribal constitution. The "Kansas Delawares" do not offer any substantial argument that such a statute would have been subject to constitutional attack and the District Court tacitly conceded that such a statute would raise no constitutional issue. J.S. App. pp. 25-26, n. 20, pp. 22-23 and n. 23.

It defies belief that the constitutional result must change because Congress elected to distribute a portion of the funds directly to the defined tribal members and another portion, rather than all, to the tribal governments.[4]

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[4] Appellees contend, belatedly, that the Delaware Tribe of Oklahoma Appellant in No. 75-1301, did not conform to the terms of 25 U.S.C. §1301 *et seq.* in adopting its constitution insofar as that Act imposes procedural requirements upon the adoption of a tribal constitution. While obviously irrelevant here, the short answer is that if there be any merit in this contention, the "Kansas Delawares" are limited to invoking the remedies provided in that Act, not to attacking the constitutionality of 25 U.S.C. (Supp. IV) §§ 1291-1297. See, for an analogous case, *Daly* v. *United States* (Crow Creek Sioux Tribe), 483 F.2d 700 (8th Cir. 1963).

At all events, it is patent from the express words of the statute, including particularly §§ 1293 and 1294 that Congress knew it was dealing with federally recognized Delaware Tribes; that Congress effectuated the distribution of this judgment to the modern tribal entities, in a manner analogous to many other distributions (see, statutes cited in Brief for the Secretary of the Interior, No. 75-1495, p. 23, n. 23), and in conformity with the construction of the Indian Claims Commission Act—*expressly* put before Congress in the Hearings conducted by the House and Senate Subcommittees on Indian Affairs when this statute was being drafted—that "the Indian Claims Commission Act requires that awards be made, *not* to individual descendants of tribal members at the time of the taking, but to *the tribal entity or entities today.*" *Minnesota Chippewa Tribe* v. *United States*, 161 Ct.Cl. 258, 267-268, 315 F.2d 906, 913-914 (1971) (emphasis added).

The bare assertions that Congress did not "really" mean what the statute it enacted says, or that Congress did not "intend" to do something (distribute this judgment to federally recognized Delaware Tribes) when the terms of the statute itself refute such a contention are untenable. These sweeping assertions—unsupported by any citation of authority—furnish no reasoned argument upon which to vitiate a Statute of the United States. *Cf.*, *Mathews* v. *Diaz*, U.S. , No. 73-1046, decided June 1, 1976: ". . . the party challenging the constitutionality of the particular line Congress has drawn has the burden of advancing principled reasoning that will *at once* invalidate that line and yet tolerate a different line separating some [part of a class] from others" (emphasis added).

Precisely like *Diaz*, the instant case "involves nothing more than a claim that it would have been more reasonable for Congress to select somewhat different requirements of the same kind" and here, as in *Diaz*, ". . . appellees have not identified a principled basis for prescribing a different standard than the one selected by Congress, [and, therefore] they have, in effect, merely invited us to substitute our judgment for that of Congress. . . ." Here, as in *Diaz*, we submit the Court should "decline the invitation." ... U.S. ..., ....

**D.**

**NO QUESTION REGARDING THE *PROCEDURAL* REQUISITES OF A CLASS ACTION IS AT ISSUE IN THIS CASE**

At pages 41-43 of their Brief the "Kansas Delawares" argue what is not denied: that this action meets the *procedural* requisites of a class action under Rule 23, Fed. R. Civ. Proc.

As the "Kansas Delawares" correctly note (p. 42), the tribal Business Committee moved to dismiss the Complaint on the ground of the immunity of the Tribe, a substantive question of federal law unaffected by the procedural device of a class action, or the invocation of the Declaratory Judgment Act.

We stated in our original Brief, and repeat here, that if the Court is of the opinion the question of immunity was waived by the decision of the class, as defined by the District Court, to intervene in order to obtain a judgment which would put this long-litigated case to rest, the question of tribal immunity may, and should, be disregarded.

## E.

## A FACIALLY VALID STATUTE CANNOT BE VITIATED ON THE GROUND IT DOES NOT CONFORM TO THE "LEGISLATIVE OBJECT" OF CONGRESS

Sections II(A) and II(B) of the "Kansas Delawares" Brief contain as their indispensable predicate or, in Appellees' own words, "critical step" (p. 44) the argument that 25 U.S.C. (Supp. IV) §§ 1291-1297 is unconstitutional given the "legislative purpose for which the statute was enacted." The contention is that there was only one permissible "legislative purpose" for which Congress *could* have enacted 25 U.S.C. (Supp. IV) §§ 1291-1297 and that this legislative purpose may only be derived *not* from the terms of the statute itself, but rather from the supposed "legislative purpose" of the Indians Claims Commission Act, 60 Stat. 1049-1055, 25 U.S.C. §§ 70-70(v).

By thus predicating the constitutionality of the statute upon Congress' supposed object in enacting it; then announcing that there is only one "permissible" object for which the statute could be enacted; and then finding that the statute does not meet the "criteria" of the supposed "object," the "Kansas Delawares" reach the conclusion that the statute must violate the Due Process Clause.

This contention should not be accepted as a basis for voiding an Act of Congress which is, on its face, valid.

The first prong of the argument, *i.e.*, that a statute valid on its face may be voided by positing a single "congressional purpose" and then concluding that the statute does not suit the purpose is untenable. Significantly, no decision of this, or any other, Court is cited in support of such a contention. Indeed, even in construing Acts of Con-

gress to determine their proper application, this Court has refused to read into a specific statute an allegedly "immanent" meaning. *Utah Junk Company* v. *Porter, Administrator*, 328 U.S. 39, 43-44. Since the Legislative Branch may have more than one "purpose" in enacting any statute, or may feel one purpose more acutely than another, " 'a statute is not invalid under the Constitution because it might have gone farther than it did. . . .' " *Katzenbach* v. *Morgan*, 384 U.S. 641, 657, quoting, *Rochen* v. *Ward*, 279 U.S. 337, 339. With the exception of *Morey* v. *Doud*, 354 U.S. 457, "the only case in the last half-century to invalidate a wholly economic regulation solely on equal protection grounds, . . ." this Court has consistently recognized broad legislative discretion—absent a suspect classification or a fundamental interest upon which a particular statute impinges—in which to enact classification statutes. *New Orleans* v. *Dukes*, ___ U.S. ___, No. 74-775, decided June 25, 1976, *overruling, Morey* v. *Doud, supra*. These principles are, of course, fully applicable to the statute now at bar (even considered apart from Congress' plenary power over Indian affairs) and we would add only that the lengths to which Appellees must strain for their "legislative purpose" argument are enhanced by the fact that they rely, not merely upon the legislative history of 25 U.S.C. (Supp. IV) §§ 1291-1297 to vitiate the statute, but, rather, upon the legislative history of the Indian Claims Commission Act (pp. 44-48).

The second prong of the argument, *i.e.*, reading a notion of "congressional object" into a statute, on the basis of the legislative history of another statute, is a dubious procedure even when the question before the Court is the proper construction of a statute. The argument that this sort of "inter-

pretation" may be used to hold a facially valid statute unconstitutional is refuted by many decisions of this Court. See, *e.g.*, *Weber* v. *Freed*, 239 U.S. 325, 330; *United States* v. *O'Brien*, 391 U.S. 367, 383.

Even considered on Appellees' own terms, however, their argument fails to demonstrate that the statute at bar violates the Due Process Clause. We would, in this regard, invite the Court's particular attention to the fact that: "Congress had before it another Bill which would have distributed [Indian Claims Commission Docket] 72 and 298 funds in exactly the same manner as the wrongful and horrendous distribution made in [Indian Claims Commission Docket] 337 [25 U.S.C. §§ 1181-1186]. *Congress rejected this Bill with full knowledge that there were some people claiming Delaware ancestry and entitlement to Delaware Tribal funds who would not be included within this distribution to the two recognized Delaware Tribes in Oklahoma and those on their membership rolls.*" J.S. App. 89; 406 F.Supp. 1357 (Daugherty, J., dissenting).

Since the bulk of Appellees' argument for holding, 25 U.S.C. (Supp. IV) §§ 1291-1297 turns upon the flawed premise that "in view of the legislative purpose for which the Congress enacted the statute" (p. 47) the statute must be held unconstitutional, Appellees' conclusion is equally flawed. The statute, valid on its face, may not be vitiated by such reasoning as Appellees put forth.

The claim (pp. 53-54) that 25 U.S.C. (Supp. IV) §§ 1291-1297 is unconstitutional because it includes within its terms persons who do not have any affiliation with modern-day tribal entities is plainly incorrect. The statute expressly limits distribution to those who are on, or eligible

to be on, the 1940 base census roll of the Absentee Delaware Tribe of Western Oklahoma; expressly provides for representation by the tribal government in the distribution process; and expressly provides that ten per cent of the funds distributed are to go to the Absentee Delaware Tribe of Western Oklahoma for use by the tribal government. 25 U.S.C. §§ 1293, 1294.

Appellees' assertion (p. 54) that the Absentee Delaware Tribe of Western Oklahoma and its members are not "wards of the nation" is plainly erroneous. The Tribe is, and has been for many years, a federally recognized tribe, receiving numerous tribal services from the Bureau of Indian Affairs and other agencies of the Departments of Interior, Agriculture, and Health, Education and Welfare.

The "Kansas Delawares" suggestion that the "right of an Indian to membership in his tribe is a valuable right which cannot be terminated except by a clear and unequivocal Act of Congress" (p. 55) is unsupported by citation of relevant authority and, even assuming, *arguendo*, that it may have merit in some contexts, Article IX of the Treaty of July 4, 1866, 14 Stat. 793, 796, and the Act of June 22, 1874, 18 Stat. 146, 175, taken together, clearly constituted such a termination insofar as the "Kansas Delawares" are concerned. *United States* v. *Kagama*, 118 U.S. 375, 383; *Nagle* v. *United States*, 191 Fed. 141 (9th Cir., 1911). See generally, F. Cohen, *Federal Indian Law*, pp. 4-12 (Rev. Ed., 1958).[5]

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[5] That such termination does not lessen the power of Congress to enact special laws (for example, allotment and liquor control statutes) applicable in "Indian country" is irrelevant here. For this reason, Appellee's reliance upon such cases as *Hallowell* v. *United States*, 221 U.S. 317, and its progeny (p. 55) is misplaced.

## F.

## THE DELAWARE TREATY OF 1866 VESTED NO CONSTITUTIONAL RIGHT TO THE FUNDS AT ISSUE IN THE "KANSAS DELAWARES"

The "Kansas Delawares" rather remarkable contention that the District Court did not conclude that "the Constitution requires Indian claims judgments to be paid to all those individuals who are lineal descendants of the ancient Tribe, as it was composed at the 'time of the wrong'" (pp. 60-61) is inexplicable. It was upon precisely such reasoning that the "Kansas Delawares" have based their claim from the time of the filing of their Complaint (Complaint, Para. 16; Joint Appendix p. 11) and it was this reasoning which the District Court accepted in holding that Congress had exceeded its plenary power over Indian affairs in excluding the "Kansas Delawares" from the distribution provided by 25 U.S.C. (Supp. IV) §§ 1291-1297. Indeed, unless a rationale derived from the concept of payment to lineal descendants of those who were members of the Tribe at the "time of the wrong" is accepted as the basis for the "Kansas Delawares" argument, their argument ceases to possess intelligibility.[6]

The rationale of distribution from the "time of the wrong" is unacceptable, however, since, in addition to other reasons already discussed, the provision in Article IX of

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[6] Plainly, Appellees' argument rests on the premise that the Constitution requires distribution to all persons who are descendants of the ancient tribe. Appellees state, for example, that use of a 1906 payroll cannot be "a rationale to exclude the Kansas Delawares from a roll to be prepared to compensate for a wrong which was suffered by *their tribal ancestors when those ancestors were with the tribe.*" (p. 50; emphasis added.)

the Treaty of July 4, 1866, 14 Stat. 793, 796, under which the ancestors of the "Kansas Delawares" received their proportionate share of the assets "*then* held in trust" could not, on any theory, vest in the "Kansas Delawares" a constitutional right to receive payment from a statute enacted more than one hundred years later. See, *Northern Cheyenne Tribe* v. *Hollowbreast*, ... U.S. ..., No. 75-145, decided May 19, 1976.

## CONCLUSION

The central premise around which virtually all of the "Kansas Delawares" Brief is constructed is that a statute valid on its face may, indeed, must be declared unconstitutional because the statute does not fit the "legislative object" or "purpose" which Appellees believe Congress had, or should have had, in mind in enacting the statute. As demonstrated, the premise is flawed and conclusions derived from it are, necessarily, equally flawed. See, *e.g.*, *Weber* v. *Freed*, 239 U.S. 325, 330; and *United States* v. *O'Brien, supra*, 391 U.S. 367, 383.

Even taken on its own terms, Appellees' argument as to Congress' motives for enacting 25 U.S.C. (Supp. IV) §§ 1291-1297 is most dubious. See, J.S. App. 89; 406 F.Supp. 1357 (Daugherty, J, dissenting).[7]

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[7] "Congress had before it another Bill which would have distributed [Indian Claims Commission Docket] 72 and 298 funds in exactly the same manner as the wrongful and horrendous distribution made in [Indian Claims Commission Docket] 337 [25 U.S.C. §1181-1186]. *Congress rejected this Bill with full knowledge that there were some people claiming Delaware ancestry and entitlement to Delaware Tribal funds who would not be included within this distribution to the two recognized Delaware Tribes in Oklahoma and those on their membership rolls." Id.* (emphasis added).

Moreover, Appellees' arguments regarding their status *vis a vis* the status of their ancestors as of 1854 or 1866 are simply irrelevant to the question of Congress' express power to enact Indian affairs legislation dealing with the modern federally recognized Delaware Tribes, *Morton* v. *Mancari*, 417 U.S. 535, 552-553, and n. 24.

The statute at issue implicates no fundamental interest, involves no suspect classification, and was enacted in an area where Congress' power has, from the beginning of the Nation been held to be plenary. *E.g., Sizemore* v. *Brady, supra*, 235 U.S. 441, 447-449; *Simmons* v. *Eagle Seelatsee*, 244 F.Supp. 808, 813-814, *affirmed*, 384 U.S. 209. The present case presents no extraordinary facts or unique circumstances sufficient to justify an exception to precedents so long established and consistently applied by this Court as those concerning Congress' plenary power over Indian affairs.

Examination of the "Kansas Delawares" argument does not refute the correctness of this position. To the contrary, the "Kansas Delawares" entire argument really comes down to no more than the belief that Congress could have included them within the terms of this distribution statute, despite Article IX of the Treaty of July 4, 1866, 14 Stat. 793, 796, and that Congress should have done so. Assuming the correctness of the argument that Congress had the raw power to include the "Kansas Delawares" within the terms of 25 U.S.C. (Supp. IV) §§ 1291-1297, Appellees have failed to put forward any demonstration that, in an area where there is extraordinarily broad legislative discretion, the contrary decision reached by Congress ex-

ceeds the power of the Legislative Branch to enact legislation dealing with Indian Tribes, pursuant to its express constitutional authority.

For these reasons, as well as others urged in our original Brief, the judgment of the District Court should be reversed.

Respectfully submitted,

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October, 1976

## CERTIFICATE OF SERVICE

I, Bernard J. Rothbaum, Jr., a member of the Bar of the Supreme Court of the United States, hereby certify that I did, on the ____ day of October, 1976, serve three true and correct copies of the above and foregoing Reply Brief upon: Mr. Delmer L. Stagner, Suite 700, 101 Park Avenue Building, Oklahoma City, Oklahoma 73102, counsel of record for Appellee, Wanda June Weeks; Mr. John G. Ghostbear, 340 Court Arcade Building, Tulsa, Oklahoma 74103, counsel of record for Appellees, Dorothy Frazier and Ruth Rattler; Mr. Henry B. Taliaferro, Jr., Casey, Lane & Mittendorf, 815 Connecticut Avenue, Washington, D.C. 20006, counsel of record for Appellee, Wanda June Weeks; and Mr. Joseph Fontana, 1730 Pennsylvania Avenue N.W., Washington, D.C. 20006, counsel of record for Appellants, Cherokee Delaware Class and named individual members thereof; by placing three copies of the same in the United States mail, postage fully prepaid; I further certify that I did on the ____ day of October, 1976, in conformity with Rule 33, 2(a) of the Rules of the Supreme Court, serve three true and correct copies of the above and foregoing Reply Brief upon the Solicitor General, Office of the Solicitor General, Department of Justice, Washington, D.C. 20530, by placing the same in the United States mail, postage fully prepaid; I further certify that all parties required to be served have been served; and that service has been made in conformity with Rule 33 of the Rules of the Supreme Court.

.....

Bernard J. Rothbaum, Jr.